



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 215, 216, 233, and 252

[Docket DARS-2021-0010]

RIN 0750-AJ73

Defense Federal Acquisition Regulation Supplement: Postaward Debriefings (DFARS Case 2018-D009)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 that provides enhanced postaward debriefing rights under negotiated contracts, task orders, and delivery orders.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Ziegler, telephone 571-372-6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 86 FR 27354 on May 20, 2021, to implement section 818 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91). Section 818 amends 10 U.S.C. 2305 to enhance

postaward debriefing rights for competitive negotiated contracts, task orders, and delivery orders that exceed \$10 million and to provide offerors the opportunity, upon receiving a postaward debriefing, to submit follow-up questions related to the debriefing and to receive agency responses. Section 818 also amends 31 U.S.C. 3553(d)(4) to delay the beginning of the timeframe during which the contracting officer shall immediately suspend contract performance or terminate the awarded contract if a protest is filed. These changes may also impact the timeframe for filing a timely protest. Four respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

Edits were made to the proposed rule to clarify the time periods for requesting, delivering, and completing the postaward debriefing, including the impact of additional questions on the timely submission of protests to the Government Accountability Office (GAO). Conforming edits were made to the time periods associated with protests to the GAO and in the solicitation provision and contract clause.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Some respondents supported the rule.

Response: DoD acknowledges the support.

2. Clarification of Protest Timeline

Comment: Some respondents requested that DoD clarify the timelines for additional questions as it pertains to the protest window.

Response: DoD has simplified the text throughout the final rule to address potential confusion and adopt the plain language interpretation in *NIKA TECHNOLOGIES INC. V. UNITED STATES*, United States Court of Appeals for the Federal Circuit, decided February 4, 2021. The final rule is revised to clarify that, for DoD, the 5-day protest window at Federal Acquisition Regulation (FAR) 33.104 begins on the date that the postaward debriefing is offered, unless additional questions are received within 2 business days after the debriefing date. If the agency receives timely additional questions from the offeror, the agency will respond in writing within 5 business days. Upon delivery of the agency response, the 5-day protest window will begin.

3. Expansion to Successful Offerors

Comment: One respondent expressed concerns that the proposed rule expands the requirement to provide a postaward debriefing to successful offerors, although section 818 only requires a debriefing of disappointed offerors.

Response: The proposed rule does not expand the requirement for postaward debriefings to successful offerors, because the

FAR already provides for postaward debriefings to both successful and unsuccessful offerors at FAR 15.506(b).

4. Untimely Additional Questions

Comment: One respondent recommended that additional questions be permitted more than 2 days after the debriefing and answered voluntarily without impacting the process.

Response: While contracting officers have the discretion to voluntarily answer questions received after the postaward debriefing is concluded, the statute requires a response to only those questions received within 2 business days after the postaward debriefing.

5. Source Selection Decision Document Release

Comment: One respondent recommended DoD provide the source selection decision document prior to the postaward debriefing, because it may result in more relevant questions and fewer requests for debriefings.

Response: The statute provides that certain offerors requesting a debriefing in accordance with FAR 15.506 are eligible to receive a redacted source selection decision document as part of the postaward debriefing. As a result of section 818, debriefed offerors will have the opportunity to submit additional follow-up questions about the debriefing, including questions about the source selection decision document.

6. Document Redaction Standards

Comment: One respondent expressed concerns that the quality of redactions is inconsistent and suggested that strict standards be set for redacting source selection documentation to protect proprietary information before implementing this policy change.

Response: Establishing additional redaction guidelines beyond those already in the FAR is outside scope of this rule.

C. Other Changes

The final rule also—

- Corrects the location of the online annual representations and certifications in the System for Award Management at DFARS 212.301(f) to reflect *<https://www.sam.gov>*;
- Redesignates DFARS 216.506 paragraph (S-70) as 216.506-70 paragraph (a); and
- At 215.570 and 216.506-70 clarifies that the prescriptions for the new DFARS provision and clause apply to acquisitions valued at \$10 million or more.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products Including Commercially Available Off-the-Shelf (COTS) Items, and for Commercial Services

This final rule creates one new solicitation provision at 252.215-7016, Notification to Offerors-Postaward Debriefings, for use in competitive negotiated solicitations, and one new contract clause at 252.216-7010, Postaward Debriefings for Task Orders and Delivery Orders, for use in multiple-award contracts.

DoD is not applying the rule to contracts and subcontracts valued at or below the SAT. DoD is applying the rule to contracts for the acquisition of commercial products including COTS items and for the acquisition of commercial services.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT)

41 U.S.C 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council (FAR Council) makes a determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations. DoD did not make that determination. Therefore, this rule does not apply below the SAT.

B. Applicability to Contracts for the Acquisition of Commercial Products Including Commercially Available Off-the-Shelf (COTS) Items and for the Acquisition of Commercial Services

10 U.S.C. 2375 governs the applicability of laws to DoD contracts and subcontracts for the acquisition of commercial

products including COTS items and for the acquisition of commercial services, and is intended to limit the applicability of laws to contracts for the acquisition of commercial products including COTS items and for the acquisition of commercial services. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial product contracts and commercial service contracts, the provision of law will apply to contracts for the acquisition of commercial products and commercial services. Due to delegations of authority from USD(A&S), the Principal Director, DPC is the appropriate authority to make this determination. DoD has made that determination. Therefore, this rule does apply to the acquisition of commercial products including COTS items and to the acquisition of commercial services, if otherwise applicable.

C. Determination

Given that the requirements of section 818 apply to contracts valued at \$10 million or higher, DoD will not apply the requirements of section 818 to contracts valued at or below the SAT. However, DoD will apply the requirements of section 818 to negotiated procurements and contracts for the acquisition of commercial products including COTS items and for the acquisition of commercial services.

It is not in the best interest of the Federal Government to exempt application of this rule to commercial products including COTS items and to commercial services, for the following reasons. Implementation of section 818 affords offerors the opportunity for enhanced postaward debriefings for contracts, task orders, and delivery orders that exceed \$10 million. Implementation provides offerors the opportunity, upon receiving a postaward debriefing, to submit follow-up questions related to the debriefing and to receive an agency response. These enhanced postaward debriefing requirements will assist in developing small business capabilities, provide increased participation, and promote competition. Properly conducted postaward debriefings with this enhanced transparency may minimize the number of unnecessary protests filed while strengthening relationships between DoD and industry.

Applying these requirements to the acquisition of commercial products and commercial services does not increase the burden on offerors, since the rule only enhances existing requirements concerning postaward debriefings. Exclusion of acquisitions of commercial products including COTS items and of commercial services would greatly limit access to the benefits afforded to successful and unsuccessful offerors by the section 818 requirements.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory

alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This rule amends the DFARS to implement section 818 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91), which provides offerors and contractors with significantly enhanced written or oral debriefing information for negotiated contracts and task orders or delivery orders that exceed \$100 million, and the opportunity for small entities and nontraditional defense contractors to obtain such information for awards that exceed \$10 million but do not exceed \$100 million.

The objective of the rule is to ensure offerors are provided a standard written or oral postaward debriefing at the dollar thresholds in the statute, while protecting the confidential and proprietary information of other offerors. The statute also provides direction to contracting officers when notified that a protest has been received by the Government Accountability Office.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

This rule is not expected to have a significant economic impact on a substantial number of small entities, because the enhanced ability to obtain source selection information for actions over \$10 million by submitting questions is voluntary. However, obtaining such additional information may be helpful to entities competing on future actions.

Data obtained from the Federal Procurement Data System for FYs 2018, 2019, and 2020 indicate that DoD awarded an average of

approximately 5,534 negotiated awards and delivery orders or task orders per year valued between \$10 and \$100 million. Of those actions, an average of 3,994 were awarded to approximately 1,543 unique small entities and 1,311 nontraditional defense contractors. Based upon that data, approximately 1,543 unique small entities will have the opportunity to request and obtain enhanced debriefing information if desired.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the rule that would meet the requirements of the statute.

VII. Paperwork Reduction Act

The rule does not contain information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 212, 215, 216, 233, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 215, 216, 233, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 212, 215, 216, 233, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

2. Amend section 212.301 by—

- a. In paragraph (f) introductory text, removing “<https://www.acquisition.gov>” and adding “<https://www.sam.gov>” in its place;
- b. Adding paragraph (f)(vi)(F);
- c. Redesignating paragraphs (f)(vii) through (xviii) as paragraphs (f)(viii) through (xix); and
- d. Adding new paragraph (f)(vii).

The additions read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(vi) * * *

(F) Use the provision at 252.215-7016, Notification to Offerors—Postaward Debriefings, as prescribed in 215.570, to comply with section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91).

(vii) *Part 216—Types of Contracts.* Use the clause at 252.216-7010, Postaward Debriefings for Task Orders and Delivery Orders, as prescribed in 216.506-70(b), to comply with section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91).

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PART 215—CONTRACTING BY NEGOTIATION

3. Amend section 215.506 by adding paragraphs (b) and (d) to read as follows:

215.506 Postaward debriefing of offerors.

(b) Notwithstanding FAR 15.506(b), when requested by a successful or unsuccessful offeror, a written or oral debriefing is required for contract awards valued at \$10 million or more (section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91)).

(d) In addition to the requirements of FAR 15.506(d), the minimum debriefing information shall include the following:

(i) For award of a contract in excess of \$10 million and not in excess of \$100 million with a small business or nontraditional defense contractor, an option for the small business or nontraditional defense contractor to request disclosure of the agency's written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

(ii) For award of a contract in excess of \$100 million, disclosure of the agency's written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

* * * * *

4. Add section 215.506-70 to read as follows:

215.506-70 Opportunity for follow-up questions.

When providing a required postaward debriefing to successful and unsuccessful offerors, contracting officers shall—

(a) Provide an opportunity to submit additional written questions related to the required debriefing not later than 2 business days after receiving the postaward debriefing;

(b) Respond in writing to timely submitted additional questions within 5 business days after receipt of the questions; and

(c) Not consider the postaward debriefing to be concluded until the later of—

(1) The date that the postaward debriefing is delivered, orally or in writing; or

(2) If additional written questions related to the debriefing are timely received, the date the agency delivers its written response.

5. Add section 215.570 to read as follows:

215.570 Solicitation provision.

Use the provision at 252.215-7016, Notification to Offerors—Postaward Debriefings, in competitive negotiated solicitations for contract awards valued at \$10 million or more, including solicitations using FAR part 12 procedures for the acquisition of commercial items.

PART 216—TYPES OF CONTRACTS

6. Amend section 216.505 by adding paragraphs (b) (6) introductory text and (b) (6) (ii) to read as follows:

216.505 Ordering.

* * * * *

(b) * * *

(6) *Postaward notices and debriefing of awardees for orders exceeding \$6 million.* In addition to the notice required at FAR 16.505(b)(6), a written or oral postaward debriefing of successful and unsuccessful awardees is required for task orders and delivery orders valued at \$10 million or more (section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91)).

(ii) Follow the procedures at 215.506 and 215.506-70 when providing the postaward debriefing to successful and unsuccessful awardees for task orders or delivery orders valued at \$10 million or more.

7. Revise section 216.506 to read as follows:

216.506 Solicitation provisions and contract clauses.

8. Add section 216.506-70 to read as follows:

216.506-70 Additional solicitation provisions and contract clause.

(a) Use the provisions at 252.215-7007, Notice of Intent to Resolicit, and 252.215-7008, Only One Offer, as prescribed at 215.371-6 and 215.408(3), respectively.

(b) Use the clause at 252.216-7010, Postaward Debriefings for Task Orders and Delivery Orders, in competitive negotiated solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, when a multiple-award contract is contemplated and task orders or delivery orders placed under the contract may be valued at \$10 million or more.

PART 233—PROTESTS, DISPUTES, AND APPEALS

233.102 [Amended]

9. Amend section 233.102 by removing "Government Accountability Office" and adding "Government Accountability Office (GAO)" in its place.

10. Add section 233.104 to read as follows:

233.104 Protests to GAO.

(c) *Protests after award.* (1) In lieu of the time periods in FAR 33.104(c)(1), contracting officers shall immediately suspend performance or terminate the awarded contract, task order, or delivery order upon notice from the GAO of a protest filed within the time periods listed in paragraphs (c)(1)(A) through (D) of this section, whichever is later, except as provided in FAR 33.104(c)(2) and (3)—

(A) Within 10 days after the date of contract award;

(B) Within 10 days after the date a task order or delivery order is issued, where the value exceeds \$25 million (10 U.S.C. 2304c(e));

(C) Within 5 days after a debriefing date offered to the protestor under a timely debriefing request in accordance with FAR 15.506 regardless of whether the protestor rejected the offered debriefing date, unless an earlier debriefing date is negotiated as a result; or

(D) Within 5 days after a postaward debriefing under FAR 15.506 is concluded in accordance with 215.506-70(b).

233.171 [Amended]

11. Amend section 233.171 by removing "Government Accountability Office" and adding "GAO" in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

12. Add section 252.215-7016 to read as follows:

252.215-7016 Notification to Offerors—Postaward Debriefings.

As prescribed in 215.570, use the following provision:

NOTIFICATION TO OFFERORS—POSTAWARD DEBRIEFINGS (MAR 2022)

(a) *Definition.* As used in this provision—

Nontraditional defense contractor means an entity that is not currently performing and has not performed any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section, for at least the 1-year period preceding the solicitation of sources by DoD for the procurement (10 U.S.C. 2302(9)).

(b) *Postaward debriefing.*

(1) Upon timely request, the Government will provide a written or oral postaward debriefing to successful or unsuccessful offerors for contract awards valued at \$10 million or more, while protecting the confidential and proprietary information of other offerors. The request is considered timely if received within 3 days of notification of contract award.

(2) When required, the minimum postaward debriefing information will include the following:

(i) For contracts in excess of \$10 million and not in excess of \$100 million with a small business or nontraditional

defense contractor, an option for the small business or nontraditional defense contractor to request disclosure of the agency's written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

(ii) For contracts in excess of \$100 million, disclosure of the agency's written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

(3) If a required postaward debriefing is provided—

(i) The debriefed Offeror may submit additional written questions related to the debriefing not later than 2 business days after the date of the debriefing;

(ii) The agency will respond in writing to timely submitted additional questions within 5 business days after receipt by the contracting officer; and

(iii) The postaward debriefing will not be considered to be concluded until the later of—

(A) The date that the postaward debriefing is delivered, orally or in writing; or

(B) If additional written questions related to the debriefing are timely received, the date the agency delivers its written response.

(c) *Contract performance.* The Government may suspend performance of or terminate the awarded contract upon notice from the Government Accountability Office of a protest filed

within the time periods listed in paragraphs (c)(1) through (3) of this provision, whichever is later:

(1) Within 10 days after the date of contract award.

(2) Within 5 days after a debriefing date offered to the protestor under a timely debriefing request in accordance with Federal Acquisition Regulation (FAR) 15.506 unless an earlier debriefing date is negotiated as a result.

(3) Within 5 days after a postaward debriefing under FAR 15.506 is concluded in accordance with Defense Federal Acquisition Regulation Supplement 215.506-70(b).

(End of provision)

13. Add section 252.216-7010 to read as follows:

252.216-7010 Postaward Debriefings for Task Orders and Delivery Orders.

As prescribed at 216.506-70(b), use the following clause:

POSTAWARD DEBRIEFINGS FOR TASK ORDERS AND DELIVERY ORDERS (MAR 2022)

(a) *Postaward debriefing.*

(1) Upon timely request, the Government will provide a written or oral postaward debriefing for task orders or delivery orders valued at \$10 million or more to the Contractor, regardless of whether the Contractor's offer for the task order or delivery order was successful or unsuccessful, while protecting the confidential and proprietary information of other contractors. The request is considered timely if received

within 3 days of notification of task order or delivery order award.

(2) If a required postaward debriefing is provided—

(i) The debriefed Contractor may submit additional written questions related to the required and provided debriefing within 2 business days after the date of the debriefing;

(ii) The agency will respond in writing to timely submitted additional questions within 5 business days after receipt; and

(iii) The postaward debriefing will not be considered to be concluded until the later of—

(A) The date that the postaward debriefing is delivered, orally or in writing; or

(B) If additional written questions related to the debriefing are timely received, the date the agency delivers its written response.

(b) *Task order or delivery order performance.* The Government may suspend performance of or terminate the awarded task order or delivery order upon notice from the Government Accountability Office of a protest filed within the time periods listed in paragraphs (b)(1) through (3) of this clause, whichever is later:

(1) Within 10 days after the date a task order or delivery order is issued, where the value exceeds \$25 million (10 U.S.C. 2304c(e)).

(2) Within 5 days after a debriefing date offered to the protestor under a timely debriefing request in accordance with Federal Acquisition Regulation (FAR) 15.506 unless an earlier debriefing date is negotiated as a result.

(3) Within 5 days after a postaward debriefing under FAR 15.506 is concluded in accordance with Defense Federal Acquisition Regulation Supplement 215.506-70(b).

(End of clause)

[FR Doc. 2022-05531 Filed: 3/17/2022 8:45 am; Publication Date: 3/18/2022]